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In The

Supreme Court of the United States

October Term, 1968

No. 1230

T. EUGENE THOMPSON,

Appellant,

vs.

TRAVELERS INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, TIME INSURANCE COMPANY, EDWARD ERNEST NELSON, an Underwriter at Lloyd's of London, ZURICH INSURANCE COMPANY, GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., and OTTO SWOBODA, as Special Administrator and Guardian,

Appellees.

APPELLEES' MOTION TO AFFIRM OR DISMISS APPEAL AND BRIEF

OSCAR C. ADAMSON, II
400 Second Avenue South – 7th Floor
Minneapolis, Minnesota 55401
and
JAMES H. GERAGHTY, SAMUEL L. HANSON,
RICHARD E. KYLE, J. NEIL MORTON
of Saint Paul, Minnesota, and
ARTHUR W. NELSON, F. ROBERT KOLACKE
of Minneapolis, Minnesota
Attorneys for Appellee
Insurance Companies

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TABLE OF CONTENTS

	Page
MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS THE APPEAL	1
STATEMENT OF THE CASE	3
ARGUMENT:	
Introduction	7
I. The Federal Questions Raised by Appellant Have Been Previously Decided Adversely to Appellant	8
II. The Appeal Was Not Taken in Conformity to Title 28, United States Code, §1257(2) and Does Not Present a Substantial Federal Question, and the Judgment Rests Upon an Adequate Non-Federal Basis	12
A. The appeal is not within the jurisdiction of this Court because not taken in conformity to Title 28, U.S.C., §1257(2)	12
1. The questions presented do not challenge the validity of any Minnesota statute on the ground of its being repugnant to the United States Constitution and thus do not meet jurisdictional requirements of §1257(2)	12
2. The Minnesota Supreme Court did not pass upon the validity of Minnesota Statutes, §525.87, and thus the questions presented do not meet the jurisdictional requirements of §1257(2)	14
B. The questions raised in the jurisdictional statement are not substantial and thus are not within this Court's jurisdiction	15
C. The decision of the Minnesota Court is based upon the the adequate non-federal ground of collateral estoppel	18
III. The Federal Questions Sought to Be Reviewed Were Not Timely or Properly Raised, or Expressly Passed On	20
CONCLUSION	23
APPENDIX:	
Opinion of the Supreme Court of Minnesota: Travelers Insurance Company v. Thompson, 163 N.W.2d 289 (Minn. 1968)	25

TABLE OF AUTHORITIES

CASES: Page

Adams v. Louisiana Board of Liquidators, 144 U.S. 651, 12 S.Ct. 756, 36 L.ed. 578 (1892) 19
Adelman v. Onischuk, 271 Minn. 216, 135 N.W.2d 670 (1965) 20
American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.Ct. 98, 77 L.ed. 231 (1932) 22
Austin v. United States, 125 F.2d 816 (7th Cir. 1942) 9, 17
Becchetti v. Bakke, 274 Minn. 85, 142 N.W.2d 288 (1966) 21
Campbell v. Glenwood Hills Hospitals, 273 Minn. 525, 142 N.W.2d 255 (1966) 21
Central Land Co. v. Laidley, 159 U.S. 103, 16 S.Ct. 80, 40 L.ed. 91 (1895) 14
Chouteau v. Gibson, 111 U.S. 200, 4 S.Ct. 340, 28 L.ed. 400 (1884) 19
Ciucci v. Illinois, 356 U.S. 571, 78 S.Ct. 839, 2 L.ed.2d 983 (1958) 3
Cleaver v. Mutual Reserve Fund Life Association, 61 L.J.Q.B. 128 [1892], 1 Q.B. 147 10
Connecticut Fire Insurance Company v. Ferrara, 277 F.2d 388 (8th Cir. 1960) 9-10, 17
Consol. Turnpike Co. v. Norfolk & Ry. Co., 228 U.S. 326, 33 S.Ct. 510, 57 L.ed. 857 (1912) 22
Deposit Bank v. Frankfort, 191 U.S. 499, 24 S.Ct. 154, 48 L.ed. 226 (1903) 17
Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927) 17
Edelman v. California, 344 U.S. 357, 73 S.Ct. 293, 97 L.ed. 357 (1953) 22
E. I. DuPont De Nemours v. Richmond Guano Co., 297 Fed. 580 (4th Cir. 1924) 17
Enterprise Irrigation District v. Canal Co., 243 U.S. 157, 37 S.Ct. 318, 61 L.ed. 644 (1917) 19
Fleming v. Fleming, 264 U.S. 29, 44 S.Ct. 246, 68 L.ed. 547 (1923) 8
Fullerton v. Texas, 196 U.S. 192, 25 S.Ct. 221, 49 L.ed. 443 (1905) 22
Godchaux Co. v. Estopinal, 251 U.S. 179, 40 S.Ct. 116, 64 L.ed. 13 (1919) 22
Gt. Northern Ry. v. Sunburst Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.ed. 360 (1932) 22
Harding v. Illinois, 196 U.S. 78, 25 S.Ct. 176, 49 L.ed. 394 (1904) 14
Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.ed. 413 (1934) 9
In re Greifer's Estate, 333 Pa. 278, 5 A.2d 118 (1939) 17
In re Kravitz' Estate, 418 Pa. 319, 211 A.2d 443 (1965) 17
Kelmar v. District Court of Fourth Judicial District, 269 Minn. 137, 130 N.W.2d 288 (1964) 21

Page

Kenny v. Craven, 215 U.S. 125, 30 S.Ct. 64, 54 L.ed. 122 (1909) .. 19
Klein v. Pasch, 153 Minn. 291, 190 N.W. 338 (1922) 11
Lentz v. Pearson, 246 Minn. 145, 74 N.W. 662 (1956) 21
Lowe v. Patterson, 265 Minn. 42, 120 N.W.2d 313 (1963) 21
Mineo v. Eureka Security Fire & Marine Ins. Co., 182 Pa. Super. 75, 125 A.2d 612 (1965) 17
Northern Pacific Railroad v. Ellis, 144 U.S. 458, 12 S.Ct. 724, 36 L.ed. 504 (1892) 19
N. Y. & N. E. Railroad Co. v. Bristol, 151 U.S. 556, 14 S.Ct. 437, 38 L.ed. 269 (1893) 9
N. Y. Mutual Life Insurance Co. v. Armstrong, 117 U.S. 591, 6 S.Ct. 877, 29 L.ed. 216 (1886) 9, 15, 16
Oak Center Creamery Company y. Grobe, 264 Minn. 435, 119 N.W. 2d 729 (1963) 21
Postal Tele. Cable Co. v. Newport, 247 U.S. 464, 38 S.Ct. 556, 62 L.ed. 1215 (1918) 12, 18, 19
Radio Station WOW v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, 89 L.ed. 2092 (1945) 22
Railway Co. v. Twombly, 100 U.S. 78, 25 L.ed. 550 (1879) 17
Reflior v. Lansing Drop Forge Co., 134 F.2d 894 (6th Cir. 1943) 17
San Francisco v. Itsell, 150 U.S. 65, 14 S.Ct. 20, 37 L.ed. 999 (1890) 19
Sharpless v. Grand Lodge A.O.U.W., 135 Minn. 35, 159 N.W. 1086 (1916) 9, 13, 16
Southern R. Co. v. Durham, 266 U.S. 178, 45 S.Ct. 51, 69 L.ed. 231 (1924) 10
State v. Oak Center Creamery Company, 269 Minn. 505, 131 N.W. 2d 621 (1964) 21
State v. Thompson, 273 Minn. 1, 139 N.W.2d 490 (1966) 4
Straus v. American Publishers Assn., 201 Fed. 306 (2nd Cir. 1912) 17
Taylor v. Taylor, 257 N.C. 130, 125 S.E.2d 373 (1962) 17
Teitelbaum Furs, Inc. v. Dominion Ins. Co., 25 Cal. Rptr. 559, 374 P.2d 439 (1962) 17
Thompson v. Minnesota, 385 U.S. 817, 87 S.Ct. 39, 17 L.ed.2d 56 (1966) 4
Thompson v. Tahash, 286 F.Supp. 633 (D. Minn. 1968) 5
Travelers Insurance Company v. Thompson, 163 N.W.2d 289 (Minn. 1968) 3, 6, 8
United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.ed.2d 138 (1968) 11
Von Hoffman v. City of Quincy, 71 U.S. 535, 18 L.ed. 403 (1867) 8
Walker v. Saurinet, 92 U.S. 90, 23 L.ed. 678 (1875) 10
Wischstadt v. Wischstadt, 47 Minn. 358, 50 N.W. 225 (1891) 11
Zucht v. King, 260 U.S. 174, 43 S.Ct. 24, 67 L.ed. 194 (1922) 15

STATUTES AND RULES: Page

28 United States Code, §1257(2) 12, 14, 15
Minnesota Statutes, §525.87 ..... 3, 4, 7, 8, 11, 13, 14, 15, 16, 21, 23
Minnesota Rules of Civil Procedure, Rule 24.04 20
Minnesota Rules of Civil Appellate Procedure, Rule 144 20

West's Anno. Calif. Probate Code, §258 16
Conn. P. A. 1965 C. 514, §45.275 16
D. C. Code 1961, §18-109 16
Title 6, Ind. St. Anno., §6-212 16
Kan. St. Anno., §59-513 16
La. St. Anno., C. C. Arts. 996, 1560, 1710 16
N. Dak. Century Code Anno., §56-04.23 16
Okla. St. Anno., §231 16
So. Car. Code 1962, §19-5 16
Vernon's Anno. Tex. St., §41(d) 16
Utah C. A. 1953, §74-3-22 16
Va. C. A., §64-18 16

SECONDARY AUTHORITIES:

Coke, Litt. 149b 10
5 Scott, Trusts, §492, p. 3497, n. 5 (3rd ed. 1967) 16

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Appellees.

APPELLEES' MOTION TO AFFIRM OR DISMISS APPEAL AND BRIEF

MOTION TO AFFIRM, OR, IN THE ALTERNATIVE, TO DISMISS THE APPEAL

To the Honorable the Supreme Court of the United States of America:

I.

The appellees jointly move the Court, pursuant to Rule 16(d), to affirm the judgment sought to be reviewed on appeal on the ground that the Constitutional questions raised by appellant have been previously decided adversely to appellant.

II.

In the event the foregoing motion be denied, then the appellees jointly move the Court to dismiss the appeal pursuant to Rule 16(a) and (b) on the grounds that:

1. The appeal is not within the jurisdiction of the Court because it was not taken in conformity to United States Code, Title 28, Section 1257(2); that the appeal does not present a substantial federal question; and that the judgment rests on an adequate non-federal basis; and

2. The federal questions sought to be reviewed were not timely or properly raised, or expressly passed on.

OSCAR C. ADAMSON, II
400 Second Avenue South – 7th Floor
Minneapolis, Minnesota 55401
and
JAMES H. GERAGHTY, SAMUEL L. HANSON,
RICHARD E. KYLE, J. NEIL MORTON
of Saint Paul, Minnesota, and
ARTHUR W. NELSON, F. ROBERT KOLACKE
of Minneapolis, Minnesota
Attorneys for Appellee
Insurance Companies

STATEMENT OF THE CASE

The appellant's jurisdictional statement makes reference primarily to matters which are not included in the record certified by the Minnesota Supreme Court and which, under *Ciucci v. Illinois*, 356 U.S. 571, 78 S.Ct. 839, 2 L.ed.2d 983 (1958), should not be considered in connection with this motion. To properly present the motion, appellees deem it necessary to restate such facts and procedural history as do appear in the record.

This matter is an attempted appeal from a decision of the Supreme Court of the State of Minnesota in a civil declaratory judgment action that one who has been convicted of first-degree murder is not entitled, pursuant to *Minnesota Statutes*, §525.87,[1] and the common law of the State of Minnesota, to collect the benefits of insurance policies insuring against the accidental death of the murdered person. *Travelers Insurance Company v. Thompson*, 163 N.W.2d 289 (Minn. 1968). The decision does not determine the rights, if any, of the victim's minor children to the benefits of those policies.

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[1] *Minnesota Statutes*, §525.87 (enacted 1917):

> "No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person or receive any interest in the estate of the decedent, or take by devise or bequest from him any portion of his estate. No beneficiary of any policy of insurance, or certificate of membership issued by any benevolent association or organizations, payable upon the death or disability of any person, who in like manner takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who causes or procures a disability of such person, shall take the proceeds of such policy or certificate; provided, however, that an insurance company shall be discharged of all liability under a policy issued by it upon payment of the proceeds in accordance with the terms thereof, unless before such payment the company shall have knowledge that such beneficiary has taken or procured to be taken the life upon which such policy or certificate is issued, or that such beneficiary has caused or procured a disability of the person upon whose life such policy or certificate is issued."

In an eleven months' period in 1962-1963, the appellant, Tilmer Eugene Thompson, an attorney at law specializing in criminal law, purchased from appellees insurance policies pursuant to which Thompson would receive $1,055,000.00 in the event of the accidental death of his wife, Carol Thompson. On March 3, 1963, Carol was brutally murdered. On December 6, 1963, Thompson was convicted of the first-degree murder of his wife.

In 1964, the appellees began the present declaratory judgment actions. However, by agreement among all of the parties, no further action was taken in respect to the civil proceedings until the determination of the murder case so as to spare Thompson any embarrassment (publicity or otherwise) with respect to the criminal proceedings.

Thus, appellees waited until long after Thompson's first-degree murder conviction was affirmed by the Minnesota Supreme Court, *State v. Thompson,* 273 Minn. 1, 139 N.W.2d 490 (1966), and after this Court had denied Thompson's petition for certiorari, *Thompson v. Minnesota,* 385 U.S. 817, 87 S.Ct. 39, 17 L.ed.2d 56 (1966), before they brought their motion for summary judgment before the District Court of the State of Minnesota.

The motion for summary judgment was heard on April 18, 1967, and was based upon the application of *Minnesota Statutes,* §525.87, to two established facts:

(1) T. Eugene Thompson was the named primary beneficiary in each of the policies of insurance, and

(2) T. Eugene Thompson had been indicted and convicted of the first-degree murder of the insured.

The trial court (Sylvestre, J.) concluded that it could not grant summary judgment in the absence of a positive decision by the Minnesota Supreme Court ruling that a final judgment of conviction for murder is to be given collateral estoppel effect in a subsequent civil action as to the issues of

fact necessarily adjudicated against the person convicted. The trial court accordingly denied the motion for summary judgment but certified the question as being important and doubtful, thus permitting immediate appeal to the Minnesota Supreme Court.

Thompson did not raise before the trial court any of the questions which appear in the jurisdictional statement filed in this Court.

The insurance companies appealed the order to the Minnesota Supreme Court. Thompson submitted a brief as respondent in that appeal and again did not raise in that brief any of the questions contained in the jurisdictional statement filed in this Court.

Strange to report that although Thompson's petition for certiorari had been denied by this Court on October 10, 1966, Thompson and his lawyers[2] waited until July 28, 1967, before they petitioned the United States District Court, District of Minnesota, for a writ of habeas corpus. Stranger still, although the federal district court immediately notified Thompson and his lawyers of a defect in the papers, they waited until March 15, 1968, before attempting to cure the defect. And, after the federal district court, Devitt, J., had dismissed the habeas corpus proceedings on May 7, 1968: *Thompson v. Tahash,* 286 F.Supp. 633 (D. Minn. 1968), Thompson and his lawyers waited until October 13, 1968, before they petitioned the District Court of the State of Minnesota for post-conviction relief.

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[2]F. Lee Bailey (no address), and Robins & Meshbesher, Minneapolis, Minnesota. In addition to these current lawyers, Thompson was represented by the following lawyers of his own choosing—all of whom are well respected and eminently qualified: Hyam Segel and William S. Fallon of Kelly, Segel & Fallon, Saint Paul, Minnesota (criminal trial); C. Paul Jones, Minneapolis, Minnesota (criminal appeal); Benedict S. Deinard and Allen I. Saeks of Leonard, Street and Deinard, Minneapolis, Minnesota (civil trial and appeal).

Meanwhile, the appeal of the civil matter was argued on March 25, 1968, and was decided on October 15, 1968: *Travelers Insurance Company v. Thompson*, 163 N.W.2d 289 (Minn. 1968), rehearing denied January 14, 1969.

A comparison of the foregoing dates reveals a rather unusual sequence of events and has led the appellees to the conclusion that this civil litigation has been used, and is being used, as a cat's paw with respect to Thompson's post-conviction campaign. This conclusion is fortified by the fact that well over 50% of the matter contained in Thompson's Appeal Jurisdictional Statement is, purely and simply, a direct attack on his criminal conviction and has nothing to do with the issues involved in this civil litigation. Thompson's Appeal Jurisdictional Statement is, in reality, a second petition for certiorari in respect to the criminal conviction.

It follows that appellees, as private parties in a civil lawsuit, will not respond to Thompson's attack upon the validity of his conviction—except to point out that Thompson's characterization of the criminal proceedings is unsupported by anything in the record and is, to say the least, hyperbole as distinguished from truth.

Equally untruthful are Thompson's repeated assertions that the trial judge refused to grant summary judgment in favor of appellees because he believed that Thompson had not had a fair criminal trial, that Thompson's criminal conviction was not "final" for res judicata purposes, and that a judgment for appellees would violate Thompson's constitutional rights (Appeal Jurisdictional Statement, pp. 29-31). The *truth* is that the question of the fairness of the criminal trial was neither raised by Thompson nor considered by Judge Sylvestre in these proceedings—that Judge Sylvestre expressly ruled that the criminal judgment was a final judgment for res judicata purposes (A. 8-9)—and that no consti-

tutional question of any kind was either raised by Thompson or considered by Judge Sylvestre.

In its opinion herein, the Minnesota Supreme Court reversed the decision of the lower court and granted summary judgment in favor of appellees. The opinion does not discuss or decide any of the questions contained in Appellant's Jurisdictional Statement. The Court merely held that, as a matter of general law, (the doctrine of collateral estoppel) and not as an interpretation of any statute, a judgment convicting a beneficiary of the murder of the named insured is conclusive as to the result in a civil action brought on the policies of insurance where the facts and issues are identical in both actions.

The first reference by Thompson to the United States Constitution was made in a petition for rehearing filed with the Minnesota Supreme Court. On January 14, 1969, the Minnesota Supreme Court entered its order denying the petition for re-hearing without opinion, declining the invitation contained in Thompson's petition to "indicate in the form of its denial that it has carefully considered the claims of respondent [Thompson] in this Petition but has rejected them." (A. 48-49).

ARGUMENT

INTRODUCTION

In his Appeal Jurisdictional Statement, pp. 4-6, Thompson enumerates six supposed constitutional questions. Questions I, V, and VI challenge the constitutionality (equal protection; due process; right to jury trial; impairment of contract; IXth Amendment) of the doctrine of collateral estoppel. Questions II and V challenge the constitutionality (impairment of contract; due process; IXth Amendment) of *Minnesota Statutes*, §525.87. Question III attacks the de-

termination that Thompson's criminal conviction is a final judgment for res judicata purposes—but does not raise a constitutional question. Question IV challenges the constitutionality of the criminal conviction—but does not raise a constitutional question in respect to these civil proceedings. Thus, Questions III and IV are not relevant to any of the issues presented by the instant case, and Questions I and VI do not challenge the constitutionality of any statute of the State of Minnesota. It follows that only Questions II and V need be considered.

I. THE FEDERAL QUESTIONS RAISED BY APPELLANT HAVE BEEN PREVIOUSLY DECIDED ADVERSELY TO APPELLANT

Thompson claims that *Minnesota Statutes* §525.87, and the decision in *Travelers Insurance Company v. Thompson*, 163 N.W.2d 289 (Minn. 1968), impair his contract rights in violation of Article I, Section 10, of the Constitution of the United States. Thus, the question, simply stated, is whether a state may declare, pursuant to statute, that no beneficiary of a life insurance policy, who is convicted of the first-degree murder of the insured person, is entitled to the benefits of such policy even though the policy does not contain an express provision to that effect.

It is undoubted law that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Von Hoffman v. City of Quincy*, 71 U.S. 535, 550, 18 L.ed. 403, 408 (1867); *Fleming v. Fleming*, 264 U.S. 29, 44 S.Ct. 246, 68 L.ed. 547 (1923).

Since *Minnesota Statutes*, §525.87, antedates the Thompson insurance contracts by some 42 years, the statute cannot impair the contracts. Further, even if the statute were brand new, the considerations of public policy embodied in the

statute would render the statute free from constitutional attack. As this Court said in *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 434-35, 54 S.Ct. 231, 238-39, 78 L.ed. 413, 425-27 (1934):

> "Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson v. Binford,* 387 U.S. 251, 276, 77 L.ed. 288, 301, 53 S.Ct. 181, 87 A.L.R. 721. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against the impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while—a government which retains adequate authority to secure peace and good order of society."

And in *N. Y. & N. E. Railroad Co. v. Bristol,* 151 U.S. 556, 567, 14 S.Ct. 437, 440, 38 L.ed. 269, 272-73 (1893):

> "It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing public safety, health, and morals."

The Minnesota statute, as applied to the facts of the instant case, is merely declaratory of the universally-recognized common and civil law doctrine that the courts will not permit one to benefit by his own wrong. *E.g., N. Y. Mutual Life Insurance Co. v. Armstrong,* 117 U.S. 591, 6 S.Ct. 877, 29 L.ed. 216 (1886); *Sharpless v. Grand Lodge A.O.U.W.,* 135 Minn. 35, 159 N.W. 1086 (1916); *Austin v. United States,* 125 F.2d 816 (7th Cir. 1942); *Connecticut Fire Insurance*

Company v. Ferrara, 277 F.2d 388 (8th Cir. 1960); *Cleaver v. Mutual Reserve Fund Life Association,* 61 L.J.Q.B. 128, [1892] 1 Q.B. 147; Coke, Litt. 149b.

Certainly, it cannot be contended that a convicted murderer possesses a constitutional right to use the courts to enforce collection of the benefits of his crime. Nor can it be contended that a state statute, enacted and enforced to prevent the use of the courts for that purpose, is not a constitutional exercise of legislative power to secure public safety and morals.

Thompson also claims that the statute deprives him of his constitutional right to a jury trial. Of course, the statute does not do that. Apparently, what Thompson means is that the doctrine of collateral estoppel "deprives" him of the opportunity to relitigate the issue of his guilt before a second jury in a civil action. However, Thompson forgets that the Constitution does not guarantee a jury trial in civil actions in state courts. *Walker v. Saurinet,* 92 U.S. 90, 23 L.ed. 678 (1875); *Southern R. Co. v. Durham,* 266 U.S. 178, 45 S.Ct. 51, 69 L.ed. 231 (1924). Further, the doctrine of estoppel by verdict is based upon a full and complete jury trial of the contested issues. Thompson had such a jury trial.

In effect, Thompson is making the bizarre contention that a murderer who has had his full day in court is unconstitutionally penalized because he's had his full day in court. Thompson claims that had he forthrightly admitted his guilt, he would now be "free" to litigate his guilt in a civil action to determine whether he is entitled to the benefits of his admitted crime; but, because he was afforded every possible opportunity to require the State to prove such guilt beyond a reasonable doubt, he has been penalized because he is now not entitled to a "second day" in court to relitigate those same matters.

It should be noted that the Minnesota Supreme Court, in the instant case, did not have before it the issue of the construction of *Minnesota Statutes*, §525.87, where the beneficiary has pleaded guilty to first degree murder. That question is open in Minnesota. It may well be that the Minnesota Court, if and when such a case comes before it, will hold that the plea is conclusive. At the very least, such a plea is an admissible judicial admission of the most solemn nature and, absent some very unusual circumstances, would have the practical effect of foreclosing any serious litigation of the question of guilt in a subsequent §525.87 proceeding. See *Wischstadt v. Wischstadt,* 47 Minn. 358, 50 N.W. 225 (1891); *Klein v. Pasch,* 153 Minn. 291, 190 N.W. 338 (1922).

Even assuming that someone who has pleaded guilty to first degree murder might some day wish to litigate the question of his guilt in a §525.87 proceeding and assuming that the Minnesota Court would then hold the guilty plea is not a bar to such litigation, the learning of *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.ed.2d 138 (1968), is not pertinent.

In *Jackson,* this Court held that a criminal statute (the Lindbergh Law), which permits the court to impose a stiffer sentence (death) on one who is found guilty by a jury than may be imposed if the defendant pleads guilty or is tried by the Court without a jury (imprisonment), is unconstitutional because it imposes an improper burden on a defendant who wishes his guilt determined by a jury. Apparently, Thompson reasons, from *Jackson,* that res judicata is likewise an improper "burden" which cannot be imposed upon someone like him who wishes to have his guilt determined by a trial.

The answer to Thompson's argument, of course, is that his analogy is not apt. Making the penalty for a crime dependent upon a waiver of a jury is far different from declaring

that one who litigates an issue is not entitled to relitigate that issue. The stiffness of a sentence and the determination of an issue are not the same thing. It is a matter of apples and oranges. The effect of a trial is the determination of issues, and an improper burden is not placed upon one who tries such issues by holding that the trial had the effect of determining those issues. See *Postal Tele. Cable Co. v. Newport,* 247 U.S. 464, 38 S.Ct. 556, 62 L.ed. 1215 (1918).

II. THE APPEAL WAS NOT TAKEN IN CONFORMITY TO TITLE 28, UNITED STATES CODE, §1257(2) AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION; AND THE JUDGMENT RESTS UPON AN ADEQUATE NON-FEDERAL BASIS.

A. The Appeal Is Not within the Jurisdiction of This Court Because Not Taken in Conformity to Title 28, U.S.C. §1257(2).

(1) The Questions Presented Do Not Challenge the Validity of Any Minnesota Statute on the Ground of Its Being Repugnant to the United States Constitution and Thus Do Not Meet Jurisdictional Requirements of §1257(2).

Thompson has attempted to obtain review of the judgment of the Minnesota Supreme Court by appeal rather than certiorari, designating Title 28, *U.S.C.,* §1257(2), as the statutory basis for jurisdiction by appeal. That section and subdivision require, for an appeal to have been providently made, that the appellant "question the validity of a statute of any state on a ground of its being repugnant to the Constitution, treaties or laws of the United States * * *."

As indicated, of the six questions framed in appellant's Appeal Jurisdictional Statement, only questions II and V even make reference to a statute of the State of Minnesota.

The other questions framed by appellant refer only to the application by the Minnesota Court of the general law of collateral estoppel and clearly do not pretend to relate to any statute.

In question II appellant attempts to raise a constitutional issue by first implying as a premise that the Minnesota Supreme Court's decision granting summary judgment was based upon its interpretation of *Minnesota Statutes*, §525.87, and then inquiring whether such an interpretation of that statute unconstitutionally impairs the obligation of the contracts between appellant and the appellees. It is clear that the decision of the Minnesota Supreme Court, which precludes relitigation of the fact issues of appellant's guilt of the murder of his wife, is not based upon a construction or interpretation of any statute, but rather is based upon a simple application of the general law of collateral estoppel. The Court obviously relies upon *Minnesota Statutes*, §525.87, merely as the basis for disqualifying a beneficiary who "feloniously causes the life of the insured to be taken" and does not rely upon that statute as indicating the manner in which the fact question of the felonious guilt for causing the life to be taken shall be established. The statute, insofar as it pertains to insurance, neither adds nor detracts from the common law rule previously declared by Minnesota Supreme Court in *Sharpless v. Grand Lodge A.O.U.W.*, 135 Minn. 35, 159 N.W. 1086 (1916).

The same reasons destroy the premise for Thompson's attempt to challenge the constitutionality of *Minnesota Statutes*, §525.87, in question V, where he urges that the Court's interpretation denied him the right to fair treatment and due process as guaranteed by the Constitution because the insurance companies would not have been precluded from relitigating the question of appellant's guilt for the murder by a verdict of innocence in the criminal trial.

Even if the decision of the Minnesota Court granting summary judgment could fairly be considered an "interpretation" of *Minnesota Statutes,* §525.87, jurisdiction still would not exist. The observations of this Court in *Central Land Co. v. Laidley,* 159 U.S. 103, 109-10, 16 S.Ct. 80, 82, 40 L.ed. 91, 94 (1895), are directed precisely to that point:

> "The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. * * * If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the constitution of the United States, but whether the highest court of the State has erred in its construction of the statute."

(2) The Minnesota Supreme Court Did Not Pass upon the Validity of Minnesota Statutes, §525.87, and Thus the Questions Presented Do Not Meet the Jurisdictional Requirements of §1257(2).

Jurisdiction under §1257(2) requires not only that the validity of a state statute be challenged, but also that the state court's "decision is in favor of validity." As indicated, no challenge was made with respect to the validity of *Minnesota Statutes,* §525.87, until the petition for rehearing was filed in the Minnesota Supreme Court. Although the Minnesota Supreme Court, by using the statute as part of the basis for decision, necessarily upheld its validity, such use of the statute does not come within the meaning of §1257(2) since it does not constitute upholding the statute over objection that it was repugnant to the Federal Constitution. See, *e.g., Harding v. Illinois,* 196 U.S. 78, 25 S.Ct. 176, 49 L.ed. 394 (1904), where this Court declined jurisdiction where it was

clear that the state court did not actually decide any federal question.

B. The Questions Raised in the Jurisdictional Statement Are Not Substantial and Thus Are Not Within the Court's Jurisdiction.

This Court has consistently held that an appeal under §1257 will not be permitted unless the constitutional question upon which jurisdiction depends is a substantial question. See *Zucht v. King,* 260 U.S. 174, 43 S.Ct. 24, 67 L.ed. 194 (1922).

In Part I above (motion to affirm), it was argued that the attempted constitutional challenge to the decision of the Minnesota court has either been considered and determined by prior decisions of this Court or is so lacking in merit as to require affirmance without further briefs or argument. Those arguments have equal relevance here to establish that the questions raised by appellant are at best insubstantial.

To the extent that Thompson challenges the validity of the disqualification concept embodied in *Minnesota Statutes,* §525.87 (as contrasted to a challenge to the use of collateral estoppel), his position is clearly frivolous. Again, reference is made to the decision of this Court as early as 1886 in *N. Y. Mutual Life Insurance v. Armstrong,* 117 U.S. 591, 6 S.Ct. 877, 29 L.ed. 997 (1886), holding, as a matter of general common law, that one who procures the death of an insured cannot recover as beneficiary under the insurance policy. This Court said:

> "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired." (117 U.S. 600, 6 S.Ct. 881, 29 L.ed. 1000.)

Obviously, *Minnesota Statutes*, §525.87, is merely a codification of the common law rule recognized in *N. Y. Mutual Life Insurance Co. v. Armstrong, supra*, and in the early decisions in nearly all states, including Minnesota. See, *Sharpless v. Grand Lodge A.O.U.W.*, 135 Minn. 35, 159 N.W. 1086 (1916), and cases collected in 5 Scott, *Trusts*, §492, p. 3497, n. 5 (3rd ed., 1967).

Thompson's claim that the application of collateral estoppel to a criminal judgment is somehow violative of due process or natural justice comes face to face with the fact that a significant number of jurisdictions require the same result, either by statute or court decision. Jurisdictions where this result is required by statute (in that the statute provides that one who is "convicted" is automatically disinherited or disqualified as a beneficiary) include California[3], Connecticut[4], Indiana[5], Louisiana[6], South Carolina[7], Texas[8], Utah[9], Virginia[10], District of Columbia[11], North Dakota[12], Oklahoma[13], and Kansas[14]. Jurisdictions where this result

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[3]West's Anno. Calif. Probate Code, §258.

[4]Conn. P.A. 1965 C. 514, §45.275.

[5]Title 6, Ind. St. Anno., §6-212.

[6]La. St. Anno., C.C. Arts. 996, 1560, 1710.

[7]So. Car. Code 1962, §19-5.

[8]Vernon's Anno. Tex. St., §41(d).

[9]Utah C.A. 1953, §74-3-22.

[10]Va. C.A., §64-18.

[11]D. C. Code 1961, §18-109.

[12]N. Dak. Century Code Anno., §56-04.23.

[13]Okla. St. Anno. §231.

[14]Kan. St. Anno., §59-513.

is required by decision include Virginia[15], Pennsylvania[16], California[17], North Carolina[18], and the United States Court of Appeals for the Seventh[19] and Eighth Circuits[20].

(For reasons unknown to appellees, Thompson's Appendix omits a significant portion of the opinion of the Minnesota Supreme Court that discusses the above authorities. Appellees, accordingly, have printed the full opinion in an appendix hereto with the omitted portions in italics.)

Thompson claims that the Minnesota court improperly accorded finality to the criminal judgment since post-conviction proceedings were then and are now pending. Under the Minnesota rule, the criminal judgment became final for purposes of res judicata when it was entered by the District Court on December 6, 1963, despite the fact that an appeal could be and was thereafter taken. This rule is identical to that followed by this Court in connection with determining the effect of judgments of a federal court. See, *Railway Co. v. Twombly,* 100 U.S. 78, 25 L.ed. 550 (1879); *Deposit Bank v. Frankfort,* 191 U.S. 499, 24 S.Ct. 154, 48 L.ed. 226 (1903); *Refior v. Lansing Drop Forge Co.,* 134 F.2d 894 (6th Cir. 1943); *Straus v. American Publishers Assn.,* 201 Fed. 306 (2nd Cir. 1912), appeal dismissed 235 U.S. 716, 35 S.Ct. 197, 59 L.ed. 438; and *E. I. DuPont De Nemours v. Richmond Guano Co.,* 297 Fed. 580 (4th Cir. 1924).

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[15]Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927).

[16]In re Greifer's Estate, 333 Pa. 278, 5 A.2d 118 (1939); Mineo v. Eureka Security Fire & Marine Ins. Co., 182 Pa. Super. 75, 125 A.2d 612 (1965); and In re Kravitz' Estate, 418 Pa. 319, 211 A.2d 443 (1965).

[17]Teitelbaum Furs, Inc. v. Dominion Ins. Co., 25 Cal. Rptr. 559, 374 P.2d 439 (1962).

[18]Taylor v. Taylor, 257 N.C. 130, 125 S.E.2d 373 (1962).

[19]Austin v. United States, 125 F.2d 816 (7 Cir. 1942).

[20]Connecticut Fire Ins. Co. v. Ferrara, 277 F.2d 388 (8 Cir. 1960).

Clearly, by the time the criminal judgment passed through all stages of direct appeal, with the denial by this Court of a writ of certiorari, constitutional impediments to the treatment of the judgment as final for purposes of collateral estoppel could no longer exist, even assuming that they could have existed at an earlier stage.

Thompson suggests that the use of the judgment of conviction as conclusive is not fair because he would not have been entitled to use a judgment of acquittal against the insurers. A judgment of acquittal would not have been binding against the insurers because (a) it would be a finding only that Thompson's guilt had not been shown beyond a reasonable doubt, which is different from the issue (proof of guilt by a mere preponderance of the evidence) presented in the civil case, and (b) due process would not permit the use of a judgment against one who was not a party to the prior action. See, *Postal Tele. Cable Co. v. Newport*, 247 U.S. 464, 38 S.Ct. 556, 62 L.ed. 1215 (1918). These reasons, however, do not prevent the use of the criminal judgment against Thompson, since the criminal finding against him had overcome a greater burden of proof and he was a party to the action. Due process or natural justice do not require mutuality of estoppel where the reasons for denying estoppel in one direction do not exist with respect to its use in another direction.

C. The Decision of the Minnesota Court Is Based upon the Adequate Non-federal Ground of Collateral Estoppel.

It is clear that the decision of the Minnesota Supreme Court granting summary judgment against Thompson was based upon an application of the general law of res judicata and more particularly that form of res judicata known as collateral estoppel. After discussing generally the doctrine of collateral estoppel in conjunction with the historic com-

mon law rule that a criminal judgment does not constitute a bar to a subsequent civil action based upon the offense of which the party stands convicted, the Minnesota Court held:

> "We agree with appellants [insurers] that the judgment of conviction in the criminal case is conclusive as to the result of the civil action before us to determine respondent's rights to the proceeds of the insurance policies on the life of his deceased wife. We are constrained to the view that to permit a re-trial of the facts and issues already determined in the criminal proceeding would be an imposition on the courts and only tend to embarrass or bring into disrepute the judicial process." (163 N.W.2d 294.)

This Court has repeatedly held that questions of res judicata are ordinarily questions of general law which do not present any federal constitutional question. See, *Chouteau v. Gibson*, 111 U.S. 200, 4 S.Ct. 340, 28 L.ed. 400 (1884); *Enterprise Irrigation District v. Canal Co.*, 243 U.S. 157, 37 S.Ct. 318, 61 L.ed. 644 (1917); *Northern Pacific Railroad v. Ellis*, 144 U.S. 458, 12 S.Ct. 724, 36 L.ed. 504 (1892); *Adams v. Louisiana Board of Liquidators*, 144 U.S. 651, 12 S.Ct. 756, 36 L.ed. 578 (1892); *San Francisco v. Itsell*, 150 U.S. 65, 14 S.Ct. 20, 37 L.ed. 999 (1890); *Kenney v. Craven*, 215 U.S. 125, 30 S.Ct. 64, 54 L.ed. 122 (1909); and *Postal Tele. Cable Co. v. Newport*, 247 U.S. 464, 38 S.Ct. 556, 62 L.ed. 1215 (1918).

With respect to Thompson's claim that the Minnesota Court improperly accorded finality to the judgment of conviction for purposes of collateral estoppel in this action, the complete answer is that the determination of finality for purposes of collateral estoppel is solely a matter of state law so long as due process is not violated. In any event, as indicated earlier, the Minnesota rule with respect to finality

for purposes of collateral estoppel is consistent with the rule of this Court in connection with federal judgments and is surely satisfied by a judgment as to which all direct rights of appeal have been exhausted.

III. THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NOT TIMELY OR PROPERLY RAISED, OR EXPRESSLY PASSED ON.

It is the law of Minnesota that— "A person who thinks that his constitutional rights are invaded by an act of the legislature * * * must raise the objection at the earliest available opportunity * * * before he will be permitted to make an attack on the constitutionality of a statute." *Adelman v. Onischuk,* 271 Minn. 216, 231, 135 N.W.2d 670, 680 (1965), appeal dismissed, certiorari denied, 382 U.S. 108, 86 S.Ct. 257, 15 L.ed.2d 192 (1965). It is also the law of Minnesota that failure to notify the Attorney General pursuant to *Minnesota Rules of Civil Procedure,* Rule 24.04[21],

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[21] Minnesota Rules of Civil Procedure, Rule 24.04 (effective 1951):

> "When the constitutionality of an act of the legislature is drawn in question in any action to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford him an opportunity to intervene."

Minnesota Rules of Civil Appellate Procedure, Rule 144 (effective February 1, 1967), provides:

> "When the constitutionality of an act of the legislature is drawn in question in any proceeding in the Supreme Court to which the state, or an officer, agency, or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof."

The Minnesota Supreme Court Advisory Committee's Note to Rule 144 states:

> "This rule is similar to P. Fed. R. App. P. 44. The notice required by this rule must be given upon appeal even though the party has previously notified the attorney general pursuant to Minn. R. Civ. P. 24.04 while the matter was in the trial court. If the proper notice was not given to the attorney general pursuant to Rule 24.04, the Supreme Court will refuse to review the constitutional question on appeal unless the constitutional question pertains to the lack of jurisdiction of the court. Campbell v.

prevents a consideration of any constitutional issue on appeal. *Oak Center Creamery Company v. Grobe,* 264 Minn. 435, 119 N.W.2d 729 (1963); *Lowe v. Patterson,* 265 Minn. 42, 120 N.W.2d 313 (1963); *State v. Oak Center Creamery Company,* 269 Minn. 505, 131 N.W.2d 621 (1964); *Campbell v. Glenwood Hills Hospitals,* 273 Minn. 525, 142 N.W.2d 255 (1966). It is also the law of Minnesota that issues not presented to or passed upon by the District Court will not be considered by the Supreme Court. *E.g., Becchetti v. Bakke,* 274 Minn. 85, 142 N.W.2d 288 (1966); *Kelmar v. District Court of Fourth Judicial District,* 269 Minn. 137, 130 N.W.2d 288 (1964). And it is also the law of Minnesota that where points specified in a petition for rehearing appear for the first time in the petition and the case was neither tried below nor argued in the Supreme Court on the theory presented by the petition, the Supreme Court will not consider such theory. *Lentz v. Pearson,* 246 Minn. 145, 74 N.W. 2d 662 (1956).

From the very beginning of the civil declaratory judgment action it was quite clear to all concerned that appellees contended that, pursuant to *Minnesota Statutes,* §525.87, and the common law of the State of Minnesota, Thompson's first-degree murder conviction conclusively prevented him from recovering the benefits of the policies. If Thompson or his many lawyers believed that the statute or the doctrine of collateral estoppel involved a federal question, they were mighty quiet about it. Since Thompson and his attorneys failed, in any way, to inform the parties or the Attorney General of Minnesota or the District Court of Minnesota or the Supreme Court of Minnesota of any intent to raise a federal question prior to the Minnesota Supreme Court's decision,

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Glenwood Hills Hospitals, 273 Minn. 525, 142 N.W.2d 255 (1966); Oak Center Creamery Co. v. Grobe, 264 Minn. 435, 119 N.W.2d 729 (1963). In original proceedings in the Supreme Court, notice pursuant to this rule is sufficient."

Thompson was, by Minnesota law, foreclosed from challenging the constitutionality of the statute in Minnesota.

Since state law controls the method and manner of raising federal questions in state courts, and since a state's refusal to consider federal questions which are raised for the first time in a petition for rehearing is a reasonable and proper rule, and since Minnesota refuses to consider such matters which are raised for the first time in a petition for rehearing, it follows that Thompson is foreclosed from raising federal questions in this Court because of his failure to do so properly in the courts of Minnesota. *Godchaux Co. v. Estopinal,* 251 U.S. 179, 40 S.Ct. 116, 64 L.ed. 13 (1919); *American Surety Co. v. Baldwin,* 287 U.S. 156, 53 S.Ct. 98, 77 L.ed. 231 (1932); *Gt. Northern Ry. v. Sunburst Co.,* 287 U.S. 358, 53 S.Ct. 145, 77 L.ed. 360 (1932); *Radio Station WOW v. Johnson,* 326 U.S. 120, 65 S.Ct. 1475, 89 L.ed. 2092 (1945); *Edelman v. California,* 344 U.S. 357, 73 S.Ct. 293, 97 L.ed. 357 (1953).

Also, it is the rule that federal questions which were not considered by the state courts are not before this Court for review. *Fullerton v. Texas,* 196 U.S. 192, 25 S.Ct. 221, 49 L.ed. 443 (1905); *Consol. Turnpike Co. v. Norfolk & Ry. Co.,* 228 U.S. 326, 33 S.Ct. 510, 57 L.ed. 857 (1912). As Thompson concedes in his Appeal Jurisdictional Statement, p. 33, the Minnesota Supreme Court did not state in its order denying Thompson's petition for rehearing that it had considered and passed on the federal questions which were raised in the petition. Thus, there is nothing before this Court for review.

CONCLUSION

It is believed that the best summary of this case may be found in the concluding paragraph of the opinion of the Minnesota Supreme Court:

> "We accordingly view the particular judgment of conviction in the context of the facts and issues found in the original proceedings, which have been fully determined by the trial court and affirmed by this court on appeal. The record of the criminal proceedings fully establishes that respondent [Thompson] had an untrammeled right to fully litigate the issues which are identical to those in the action before us. An examination of the record satisfies us that he had every opportunity and incentive to litigate the issue of his guilt. He was himself an experienced lawyer and was afforded all of the protections which surround the modern-day defendant in a criminal trial. The case was decided against him so as to satisfy the burden of proof beyond a reasonable doubt. Full hearings were accorded respondent in post-trial proceedings preliminary to appeal, and the record of the trial and such proceedings were reviewed by this court in an exhaustive and comprehensive opinion; on application by respondent to the Supreme Court of the United States, certiorari was denied. It seems to us that under the circumstances the requirement of finality for the application of the principles of res judicata has been fully satisfied. (163 N.W. 2d 296)."

The appellees respectfully request this Court to affirm on the ground that *Minnesota Statutes,* §525.87, does not impair an obligation on the insurance contracts involved herein; or, in the alternative, to dismiss the appeal on the grounds that the application of the doctrine of collateral estoppel herein does not involve a federal question, that the decision of the Minnesota Supreme Court rests on an adequate non-federal basis, and that the federal questions which Thompson seeks to raise were not timely or properly raised

in the Minnesota courts and consequently were not considered below.

Respectfully submitted,

OSCAR C. ADAMSON, II
400 Second Avenue South – 7th Floor
Minneapolis, Minnesota 55401

and

JAMES H. GERAGHTY, SAMUEL L. HANSON,
RICHARD E. KYLE, J. NEIL MORTON
of Saint Paul, Minnesota, and
ARTHUR W. NELSON, F. ROBERT KOLACKE
of Minneapolis, Minnesota
Attorneys for Appellee
Insurance Companies

APPENDIX

MINNESOTA SUPREME COURT

No. 111 Ramsey County Murphy, J.

Travelers Insurance Company, Continental Casualty Company, Time Insurance Company, Edward Ernest Nelson, an underwriter at Lloyd's, London, and Zurich Insurance Company,

Appellants,

40903-4-5 and 40907-8 vs.

T. Eugene Thompson,

Respondent,

Otto Swoboda, Spec. Admr. of Estate of Carol S. Thompson, deceased, et al.,

Respondents.

Otto Swoboda, Spec. Admr. of Estate of Carol S. Thompson, deceased, and T. Eugene Thompson,

Respondents,

40906 vs.

General Accident Fire & Life Assurance Corporation, Ltd.,

Appellant.

Endorsed. Filed October 25, 1968. Mae Sherman, Clerk Minnesota Supreme Court

SYLLABUS

1. The general common-law rule that a conviction precludes neither the bringing of a civil action by a convicted person nor an attempt to prove that he is innocent of the offense is subject to the exception that where a convicted defendant attempts by subsequent civil litigation to profit from his own crime the judgment of conviction in the criminal case is conclusive as to the result of the civil action where the facts and issues in both are identical.

2. Minn. St. 525.87, which provides that one who "feloniously" takes the life of another shall not profit from his own wrong, declares and establishes the policy which prohibits a murderer from profiting from the death that he has feloniously caused and, as applied to the facts herein recited, comprehends one who has been convicted of an intentional killing.

3. The fact that the conviction in a criminal action is not "final" in the true sense because one who is wrongfully deprived of his liberty in a criminal action may at any time have review of an error growing out of denial of a basic constitutional right does not apply to an attempt by such convicted person to recover in a civil action any part of the estate of one whose death he has feloniously caused or to recover the proceeds of insurance policies issued to that person. Once it is decided that a conviction in a criminal case is conclusive as to facts and issues determined by the conviction, principles of public policy and the interests of litigants require that parties who had a full opportunity to litigate the issues should not be permitted to reopen and review such facts and issues in subsequent civil litigation.

Reversed.

OPINION

MURPHY, Justice.

This is an appeal from a denial by the Ramsey County District Court of appellant insurance companies' motion for summary judgment. Appellants sought declaratory relief with regard to their liabilities on a number of insurance policies purchased by respondent, T. Eugene Thompson, on the life of his deceased wife, whom he was convicted of murdering. The district court certified as important and doubtful the question of whether Thompson's 1963 conviction of first-degree murder of his wife is conclusive so as to bar his claim as a beneficiary of the insurance policies.[1] The facts in the prior criminal case are set out in detail in our opinion affirming Thompson's conviction.[2] Only those facts which are germane to a determination of the present civil action will be related here.

On the morning of March 6, 1963, Carol Thompson was beaten and stabbed to death in her St. Paul home. Evidence collected at the scene of the crime led to the arrest in Arizona of one Dick W. C. Anderson. Anderson confessed to the murder and implicated several other parties, among whom were Norman Mastrian and respondent. Anderson's testimony at the trial was that he was approached by Mastrian on March 3, 1963, and asked "if he was interested in killing a woman"; Anderson also testified that when questioned Mastrian admitted that "insurance was involved."[3] Richard Sharp, one of the men implicated in the conspiracy, testified that Mastrian had earlier offered the job to him, describing

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[1]Rule 103.03(i), Rules of Civil Appellate Procedure.

[2]State v. Thompson, 273 Minn. 1, 139 N.W.(2d) 490, certiorari denied, 385 U.S. 817, 87 S.Ct. 39, 17 L. ed.(2d) 56.

[3]273 Minn. 8, 9, 139 N.W.(2d) 497, 498.

the victim as "a churchgoing woman with four children" and "heavily insured." [4]

The facts disclosed are that between February, 1962, and January, 1963, Thompson purchased nine term policies, totaling $1,055,000, on his wife's life. The policies were to expire on dates ranging from March 15, 1963, to April 9, 1967.[5] In each of the policies Thompson was the named beneficiary. His explanations for acquiring this unusual amount of term insurance were (1) that since his wife would acquire in the event of his death $460,000 of insurance on his life and could expect to inherit $500,000 should her father die, he (Thompson) should be able to anticipate an equal amount in the event of his wife's death;[6] and (2) that "he had a premonition that his wife was going to have a tragic accident on February 8 or 9, 1963." [7]

There was testimony at the criminal trial to the effect that Thompson had been intimate with his secretary over a 2-year period from 1960 and that he had offered to marry her. The testimony showed, however, that his offers were rejected and that his secretary married another man in 1962. It appears that she last heard from Thompson at Christmas time in 1962, more than three months before the murder of Thompson's wife. The record fairly establishes that the overriding motive for the murder was to secure the proceeds of the insurance policies rather than the affair with the secretary.

1. It is agreed that Minn. St. 525.87 prevents one who has "feloniously" taken or caused the death of another from profiting from such wrongful act by inheriting from such

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[4] 273 Minn. 7, 8, 139 N.W.(2d) 497.

[5] See chart, 273 Minn. 39, 139 N.W.(2d) 517.

[6] 273 Minn. 6, 139 N.W.(2d) 496.

[7] Id.

person's estate or being a beneficiary of an insurance policy on the victim's life.[8] The core question here is whether a criminal conviction may be considered in a subsequent civil proceeding for the purpose of establishing the truth of the facts upon which the conviction was based. This question must be considered in the light of our prior decision which reviewed at length the issues and procedures involved in the criminal prosecution which resulted in respondent's conviction. It must be recognized that the facts set forth in that decision gave rise to both the criminal and the civil actions with which we are here concerned. The facts and issues in both actions are identical. The issues in the criminal case have been decided, reviewed, and affirmed on appeal. Appellant insurance companies contend that in the posture of these proceedings principles of "estoppel by judgment" or "collateral estoppel" require that the judgment in the criminal case be conclusive as to the issues raised in the civil case. Respondent contends, on the other hand, that because of the absence of the essential element of mutuality (the parties in the criminal proceedings not being the same as those in the civil proceedings) principles of estoppel may not be applied.

Collateral estoppel is a limited form of res judicata where-

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[8]Minn. St. 525.87 provides: "No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person or receive any interest in the estate of the decedent, or take by devise or bequest from him any portion of his estate. No beneficiary of any policy of insurance, or certificate of membership issued by any benevolent association or organizations, payable upon the death or disability of any person, who in like manner takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who causes or procures a disability of such person, shall take the proceeds of such policy or certificate; provided, however, that an insurance company shall be discharged of all liability under a policy issued by it upon payment of the proceeds in accordance with the terms thereof, unless before such payment the company shall have knowledge that such beneficiary has taken or procured to be taken the life upon which such policy or certificate is issued, or that such beneficiary has caused or procured a disability of the person upon whose life such policy or certificate is issued."

by a former judgment is conclusive in a later suit between the same parties or their privies as to determinative issues finally decided in the former suit. In Gollner v. Cram, 258 Minn. 8, 10, 102 N.W. (2d) 521, 523, 83 A.L.R. (2d) 971, 974, we said:

> "The doctrine of collateral estoppel (also referred to as estoppel by verdict) applies where it affirmatively appears that the issue presented has already been litigated in a prior suit between the same parties even though based upon a different cause of action. Unlike the situation where a former judgment acts as an absolute bar, it is an indispensable prerequisite to collateral estoppel that the issue involved be actually litigated and determined in the former suit."

The principle of collateral estoppel has been expressed in varying terms in Brooks Realty, Inc. v. Aetna Ins. Co., 268 Minn. 122, 128 N.W. (2d) 151; Anderson v. Mikel Drilling Co., 257 Minn. 487, 102 N.W. (2d) 293; Lustik v. Rankila, 269 Minn. 515, 131 N.W. (2d) 741. See, Annotation, 83 A.L.R. (2d) 977, 986; 10 Dunnell, Dig. (3 ed.), §§ 5161, 5162.

The general common-law rule has been that a criminal judgment is not admissible as evidence in a civil action to establish a fact determined in the criminal action nor does it constitute a bar to a subsequent civil action based upon the offense of which the party stands convicted and that the judgment of conviction is not admissible in evidence for that purpose. Wahl v. Walton, 30 Minn. 506, 16 N.W. 397; Annotations, 31 A.L.R. 261, 18 A.L.R. (2d) 1287, and 42 A.L.R. (2d) 634. It has been held that a conviction precludes neither the bringing of a civil action by a convicted person nor an attempt to prove that he is innocent of the offense. 30A Am. Jur., Judgments, §474; 50 C.J.S., Judgments, §754. In addition to the absence of mutuality in the second suit, other considerations which have influenced courts in so holding are that the judgment may not be conclusive of issues which

might have been litigated and determined in the initial action but which were not; failure or inadequacy of legal representation; the drawing of a wrong inference or misapplication of law which might give rise to an erroneous result; and the rule of evidence that the judgment in a criminal case is nothing more than the opinion of 12 jurors and, consequently, hearsay.

It is important to note that an exception to this rule has developed in situations where the convicted defendant attempts by subsequent civil litigation to profit from his own crime, as where an arsonist seeks to recover insurance proceeds for damage caused by the fire which he was convicted of setting, or where a beneficiary convicted of homicide seeks to recover under the victim's life insurance policy. In such situations courts have approached the problem from the point of view of the particular judgment offered as evidence, and have invoked the doctrine of collateral estoppel where the advantages to be derived from preventing relitigation would not be outweighed by the injustice that might result from foreclosing [the following italicized matter was omitted at page 32 of the Appendix in the Appeal Jurisdictional Statement] *attack on the prior determination. In the more recent cases where a convicted defendant has sought by civil action to profit from his own wrong, courts have not hesitated to apply the doctrine of collateral estoppel even though the parties to the two actions are not identical. Justification for overlooking the element of mutuality in the subsequent civil case is most often found in the rationale that objections to the application of collateral estoppel are not valid because the criminal conviction necessarily establishes that the requirement of a greater degree of proof has been met and because the party bound by it had every opportunity and incentive to litigate the issue. 1B Moore, Fed-*

eral Practice (2 ed.) par. 0.418[1]; 65 Harv. L. Rev. 818, 878; 5 Wigmore, Evidence (3 ed.) §1671a.

Courts have adopted various approaches in considering a judgment of conviction submitted in a subsequent civil action involving the same issues. These authorities reflect a uniform wariness on the part of courts about permitting one whose guilt has been fully determined by proof beyond a reasonable doubt to embarrass the judicial process by prevailing in a subsequent civil action involving the same facts and thereby to profit from the crime for which he was convicted. It appears that the courts of New York,[9] *Alabama,*[10] *Colorado,*[11] *and Kentucky*[12] *have held that a judgment of* conviction is admissible as evidence, normally prima facie, of the facts upon which it was based, but that it is not conclusive. Colorado has since adopted a statute changing this rule by specifically providing that the judgment of conviction is itself sufficient to disqualify the convicted heir from receiving property of the decedent through intestate succession.[13] The authorities which we choose to follow, and which control the facts in this case, have held that the judgment of conviction is conclusive in a subsequent civil action and include

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[9]*See, Schindler v. Royal Ins. Co.*, 258 N.Y. 310, 179 N.E. 711.

[10]*See, Sovereign Camp W. O. W. v. Gunn*, 224 Ala. 444, 140 So. 410; Id. 227 Ala. 400, 150 So. 491; Id. 229 Ala. 508, 158 So. 192; *Fidelity-Phenix Fire Ins. Co. v. Murphy*, 226 Ala. 226, 146 So. 387; Id. 231 Ala. 680, 166 So. 604.

[11]*See, North River Ins. Co. v. Militello*, 100 Colo. 343, 67 P.(2d) 625; Id. 104 Colo. 28, 88 P.(2d) 567.

[12]*See, Wolff v. Employers Fire Ins. Co.*, 282 Ky. 824, 140 S.W.(2d) 640.

[13]See, Colo. Rev. Stat. 1963, §153-2-13.

the jurisdictions of Virginia,[14] Pennsylvania,[15] California,[16] North Carolina,[17] and the United States Courts of Appeals for the Seventh[18] and Eighth Circuits.[19] These holdings have been applied in situations where a convicted defendant attempts to profit by his own wrong in a civil action even in the absence of the element of mutuality in the second suit.

The original decision adopting this approach is Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314, which was an action on a fire insurance policy brought after the plaintiff had been convicted of having willfully burned the insured property with intent to defraud the insurer. The defense raised was that the conviction was an estoppel to the action. The court recognized that the judgment of acquittal would not have been binding on the insurance company because it would only be a finding that the plaintiff's guilt was not proved beyond a reasonable doubt and because the company was a stranger to the criminal action. With respect to the judgment of conviction, however, the court said (149 Va. 89, 140 S.E. 316):

> "* * * We confess our inability to perceive, however, why the accused person himself should not be held either as bound or affected by the result of the prosecution, if adverse to him. He has had his day in court, with the opportunity to produce his witnesses, to examine and cross-examine the witnesses for the prosecution, and to

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[14]See, Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314.

[15]See, Greifer's Estate, 333 Pa. 278, 5 A.(2d) 118; Mineo v. Eureka Security Fire & Marine Ins. Co., 182 Pa. Super. 75, 125 A.(2d) 612; Kravitz Estate, 418 Pa. 319, 211 A.(2d) 443.

[16]See, Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal.(2d) 601, 25 Cal. Rptr. 559, 375 P.(2d) 439.

[17]See, Taylor v. Taylor, 257 N.C. 130, 125 S.E.(2d) 373.

[18]See, Austin v. United States (7 Cir.), 125 F.(2d) 816.

[19]See, Connecticut Fire Ins. Co. v. Ferrara (8 Cir.), 277 F.(2d) 388.

> appeal from the judgment. So that the chief reason for holding that the plaintiff in the civil case is not bound by the prosecution fails as to the defendant, who has once litigated the identical question and had it adversely decided, under conditions most favorable to himself—that is, in a prosecution in which he could not have been convicted unless the decisive fact, his guilt, had been shown beyond a reasonable doubt."

The court distinguished prior cases as follows (149 Va. 105, 140 S.E. 321):

> "The precedents and the rules of exclusion which have been derived therefrom, which the trial court followed, have generally arisen in cases where one claiming to be injured by the criminal act of another had brought a tort action against the alleged wrongdoer for redress of that injury, most frequently in actions for personal injury—assault and battery. This, however, is not such a case. Here the plaintiff who brings this action has committed the felony, and seeks to recover the fruit of his own crime.
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> "The rule of exclusion is a shield for the protection of those who have had no opportunity to assert their defense. To apply it here would be to convert it into a sword in the hands of one who has had such an opportunity, to be used by him for the effectuation of the same fraud which has been established, condemned and punished in the criminal case. If there be a rule which cannot stand the test of reason, it is a bad rule."

An impressive number of courts have followed the same rule, largely prompted by a public policy to discourage the use of courts in proceedings which, as the Virginia and New York courts have said, "would discredit the administration of justice, defy public policy and shock the most unenlightened conscience" and permit a possible result which would "encourage and give support to current thoughtless and carping criticism of legal procedure, and to justify the gibe that the administration of the law is the only remaining legalized lottery." 149 Va. 111, 140 S.E. 323; Schindler v. Royal

Ins. Co., 258 N.Y. 310, 313, 179 N.E. 711, 712. See, Austin v. United States (7 Cir.), 125 F.(2d) 816; Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. (2d) 601, 25 Cal. Rptr. 559, 375 P. (2d) 439; Connecticut Fire Ins. Co. v. Ferrara (8 Cir.), 277 F. (2d) 388; Fidelity-Phenix Fire Ins. Co. v. Murphy, 226 Ala. 226, 146 So. 387; Kravitz Estate, 418 Pa. 319, 211 A. (2d) 443; Griefer's Estate, 333 Pa. 278, 5 A. (2d) 118; In re Estate of Laspy (Mo.), 409 S.W. (2d) 725; Mineo v. Eureka Security Fire & Marine Ins. Co., 182 Pa. Super. 75, 125 A. (2d) 612; 5 Wigmore, Evidence (3 ed.), §1671a; 4 Wigmore, Evidence (3 ed.), §1346a. We agree with appellants that the judgment of conviction in the criminal case is conclusive as to the result of the civil action before us to determine respondent's rights to the proceeds of the insurance policies on the life of his deceased wife. We are constrained to the view that to permit a retrial of the facts and issues already determined in the criminal proceeding would be an imposition on the courts and only tend to embarrass or bring into disrepute the judicial process.

2. It is next contended by respondent that a reasonable interpretation of Minn. St. 525.87 necessarily prevents the court from adopting the rule that a conviction in a given homicide case may in a subsequent civil action be conclusive proof of the facts upon which it is based. This argument derives from language of §525.87, which states that no person who "feloniously" takes the life of another shall profit from his wrongful act. Respondent points out that statutes of this kind that existed in other states prior to the enactment of §525.87,[20] provided that persons who have been "finally con-

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[20]Compiled Laws of North Dakota 1913, §5683. "No person who has been finally convicted of feloniously causing the death of another shall take or receive any property or benefit by succession, will or otherwise, directly or indirectly, by reason of the death of such person, but all property of the deceased and all rights conditioned upon his death shall vest and be determined the same as if the person convicted was dead."

victed" or "convicted of feloniously causing the death of another" shall not profit by the wrongful act. Respondent characterizes the latter as a "conclusive" type of statute as opposed to §525.87, which is characterized as a "non-conclusive" type of statute. It is argued that because the term "feloniously" includes within its broad classification offenses in which intent may not be an essential element the term may not have the same application in both civil and criminal cases, and that if the interpretation suggested by appellants is adopted, one convicted of manslaughter or of criminal negligence resulting in death would necessarily come within the proscription of the statute.

We cannot share respondent's fears that the language of §525.87 warrants the conclusion suggested. The distinction between the two forms of statute—the one preventing recovery where there is a felonious killing and the other preventing recovery by one who was convicted of a felonious

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Neb. Rev. Stat. 1913, §1283. "No person who has been convicted of unlawfully killing another, or of conspiring unlawfully to kill another, shall take all or any portion of the property, real or personal, of the deceased, either by descent and distribution or by will; but the property to which the person so convicted would otherwise have been entitled shall go to the person or persons who would have taken the same if the person so convicted had been dead at the date of the death of the deceased."

Id. §1284. "No person who has been convicted of unlawfully killing another, or conspiring unlawfully to kill another, shall be entitled to any insurance on the life of the deceased. If the person so convicted is the beneficiary under any policy or policies of life insurance, or beneficial certificate or certificates, such insurance shall go to the person or persons who would have been entitled thereto if the person so convicted had been dead at the date of the death of the deceased."

Kan. Gen. Stat. 1915, §3856. "Any person who shall hereafter be convicted of killing or of conspiring with another to kill, or of procuring to be killed, any other person from whom such person so killing or conspiring to kill or procuring said killing would inherit the property, real, personal, or mixed, or any part thereof, belonging to such deceased person at the time of death, or who would take said property by deed, will or otherwise, at the death of the deceased, shall be denied all right, interest and estate in or to said property or any part thereof, and the same shall descend and be distributed to such other person or persons as may be entitled thereto by the laws of descent and distribution, as if the person so convicted were dead."

killing—is of little real importance since the determinative question is whether or not the killing was actually felonious. It must be kept in mind that these statutes declare and establish a policy which prohibits a murderer from profiting from a death that he wrongfully caused. It may be fairly assumed that the legislature intended to abrogate our holdings in Wellner v. Eckstein, 105 Minn. 444, 117 N.W. 830, and Gollnik v. Mengel, 112 Minn. 349, 128 N.W. 292. In each case a convicted murderer was held entitled to a share in his victim's property under the statutes of descent and distribution, Gollnik holding that because those statutes were unambiguous the court could not construe them to include an implied exception embodying the equitable principle that a wrongdoer should not be permitted to profit from his own crime. It seems to us that the legislatures enacting both types of statute were motivated by the same intention although they used different words to provide that the wrongdoer may not profit from his own crime. Moreover, it seems reasonable to us that in giving effect to that equitable rule the language used, describing such a wrongdoer as one who "feloniously takes or causes or procures another so to take the life of another," comprehends only those who have been convicted of intentional killing. Anderson v. Grasberg, 247 Minn. 538, 78 N.W. (2d) 450. It does not seem to us that the statute would warrant an interpretation that one convicted of negligent homicide would necessarily be barred from recourse to the courts in a subsequent civil action. The statute is meant to apply to those wrongdoers who intentionally cause the wrong and not to those who may have been negligent. See, Rosenberger v. Northwestern Mutual Life Ins. Co. (D. Kan.), 176 F.Supp. 379; Id. 182 F.Supp. 633.

3. It is next contended by respondent that the judgment of conviction cannot have conclusive effect in a subsequent civil action because a criminal conviction is no longer in the

true sense "final" even after review and affirmance by appellate courts. This argument derives from Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.ed. (2d) 837; Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.ed. (2d) 770; and Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.ed. (2d) 148, cases which Mr. Justice Harlan, dissenting, has characterized as a "trilogy of pronouncements" which "relegate to a back seat * * * the principle that there must be some end to litigation." 373 U.S. 23, 83 S.Ct. 1081, 10 L.ed. (2d) 166. This point may be briefly disposed of by observing that the foregoing authorities give to a convicted defendant who has been wrongfully deprived of his liberty in a criminal action the right at any time to have a review of any error growing out of the denial of a basic constitutional right. We do not understand that these holdings suspend operation of well-established rules of res judicata in civil cases. Once it is decided that the effect of the conviction in a subsequent civil case is conclusive, principles of public policy and the interests of litigants require that parties who had a full opportunity to litigate the issues should not be again permitted to reopen and review over and over again the civil aspects of the determination. 30A Am. Jur., Judgments, §§ 373, 326; 10 Dunnell, Dig. (3d ed.), §§ 5159, 5162.

We accordingly view the particular judgment of conviction in the context of the facts and issues found in the original proceedings, which have been fully determined by the trial court and affirmed by this court on appeal. The record of the criminal proceedings fully establishes that respondent had an untrammeled right to fully litigate the issues which are identical to those in the action before us. An examination of the record satisfies us that he had every opportunity and incentive to litigate the issue of his guilt. He was himself an experienced lawyer and was afforded all of the protections which surround the modern-day defendant in a criminal

trial. The case was decided against him so as to satisfy the burden of proof beyond a reasonable doubt. Full hearings were accorded respondent in post-trial proceedings preliminary to appeal, and the record of the trial and such proceedings were reviewed by this court in an exhaustive and comprehensive opinion; on application by respondent to the Supreme Court of the United States, certiorari was denied. It seems to us that under the circumstances the requirement of finality for the application of the principles of res judicata has been fully satisfied. Restatement, Judgments, §41.

Reversed.